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PRE-TRIAL[†]

By EMORY H. NILES*

Little Willie Jones had not washed his face; he had not studied his lessons; and he spent most of his spare time in reading the comics and looking at the television.

"Our Willie is a brat," said Mr. Jones to Mrs. Jones.

"That is correct," said Mrs. Jones.

In spite of this conversation they both loved Willie; they knew he was good to his sister, and that he went regularly to Sunday School.

When Mrs. Smith said to Mrs. Jones and Mr. Jones:

"*Your* Willie is a brat. He does not wash his face. He does not study his lessons, and all he is interested in is reading the comics and looking at television."

"Our Willie is *not* a brat," said Mrs. Jones. "Our Willie is a very nice boy, and a whole lot nicer than your Johnny Smith."

"I agree with my wife," said Mr. Jones, "and besides that, what business is it of yours, meddling with our family affairs?"

The moral of this story is that it all depends upon who is talking. A member of the family is presumed to love the child, and has a right to be critical. An outsider has not such a right.

Today *our* Willie Jones is the procedural system of the law of Maryland, and we are members of the family. If it is clearly understood that we are members of the family, we can call our Willie a brat, and believe that in some respects, he is a brat, even though in general he is a good boy, and we love him. It is in the spirit of a member of the family, therefore, that the subject of Pre-trial procedure is approached.

Our Willie, that is to say our procedure, is sometimes slow in doing his duty; he often wastes time; he uses a jargon that tends to obscure rather than to express the truth; he

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costs a lot of money; and in some respects certain people have an interest in keeping his expenses high. However, if we, his parents, foster parents and brothers, and in these enlightened days I must add, his sisters, and his cousins, and his aunts, can make Willie act a little more quickly, a little more efficiently, and a little more satisfactorily to the neighbors who, after all, are paying our Willie's bills, we will be doing a good work, and cannot be fairly accused of either neglecting, or not showing proper affection for, our Willie.

The purpose of this article is to explain a technique which, although very recent in the history of our legal system, has nevertheless caught the imagination both of the Bench and the Bar throughout the United States, and has, according to most reports, been found useful.

Some years ago the writer was chairman of a committee of the Baltimore Bar Association to investigate and make recommendations to that Association regarding the Integrated Bar. Our committee worked and studied, and came back with a neutral report, saying in effect that those who had the Integrated Bar liked it; those who did not have the Integrated Bar didn't want it; and, as far as we were concerned, we were on the whole neutral. I am not quite so neutral on the subject of Pre-trial, for I think it offers substantial possibilities of benefit to lawyers and their clients, not to mention the public generally. Nevertheless, I do not appear as an ardent proponent of any particular proposition. Nor do I pretend to be an authority on this subject. This is written simply for the purpose of outlining what has been done in other places, what have been the objectives of Pre-trial, what its proponents say for it, what difficulties I see in connection with it, and what benefits might be anticipated if it were given a trial in Maryland.

To repeat, I do not advocate any specific plan, and I may as well anticipate my conclusion, to wit: that without any legislation, without even a change in the Rules, without anything but initiative on the part of a few judges and the cooperation of the bar, Pre-trial is proving useful in Maryland, and its value should be further tested to a much wider degree than has yet been attempted.

Let us take a brief look at the history of procedure. It has always had the same object, namely, the promotion of justice between litigants. It has changed enormously in the light of changes of social organization and of beliefs, especially popular beliefs. When it was really believed that a witch would sink, but an innocent man would float, the ordeal by water was a rational procedure. When it was believed that the uttering of a false oath, after calling upon the proper god, would result in that god's striking the perjurer blind or dead, the oath was a more potent adjunct to finding the truth than it is believed to be today. When, as in early Roman law, or in early English law, the utterance of a prescribed formula, exactly and without a single mistake, was the prerequisite to commencing an action at law, because it was believed that the words had a divine or magic quality to evoke the truth, naturally no amendment was granted, and the failure to utter the formula exactly was considered proper and just ground for non-suiting the litigant.

A great advance was made by the Common Law over these systems of archaic procedure when oral pleadings seeking an issue of fact were devised in the Middle Ages; and these were further improved when pleadings became written, whereby in a series of reciprocal charges and answers the common law worked out a method of arriving at a definite, clear issue. But again the procedure was found not perfect, and Equity, by the introduction of a new system of pleading, by-passed the technicalities of the old "issue pleading" of the Common Law through the more direct "fact pleading" of Equity.

We are today in the period in which both the issue pleading system of the Common Law and the fact pleading system of Equity survive in part; but all will agree that the formalism of the Common Law actions and the strict rules of pleading are far less important than getting at the truth. These systems aim to get at the truth, but in many ways they were, and are, imperfect.

Let us come back to Willie. Little Willie grows up, and even though we may correct the faults which he shows at

the age of 8, 9 or 10, he develops others at 11, 12 and 13. The clothes he wore at the age of 8 will not fit at the age of 12. Society grows, times change, and the law changes with them. Little Willie is not forever in the primary school. He grows, too; and as he grows he needs new lessons and new clothes.

Is it not the experience of the vast majority of the members of the Bar that when a Judge, sensing a complicated mixture of issues of fact and law, takes a recess from formal court proceedings and asks counsel into chambers, and thereupon undertakes to find out what the real issues are, the progress of the case is often expedited? Does not the direct, personal and informal contact of people interested in really getting down to business, result, in the vast majority of cases, in their actually getting down to business; admitting things that cannot be denied, waiving proof of matters that are either immaterial, or well known, or not in dispute? Agreement, either formal or informal, can be obtained on many matters; and when cigarettes have been extinguished and pipes knocked out, both the judge and counsel return to the court, refreshed, and ready to try the case on the real issues that it presents. There, in a nutshell, is the whole idea of Pre-trial, except that instead of wasting the time of jury, witnesses and public while counsel and court are engaged in untangling the case in chambers, all this could have been done two or three weeks before by a sympathetic, patient and competent judge, with diligent, competent and well-prepared counsel.

That is Pre-trial, and the rest of it is detail. Pre-trial is not trial, for trial deals with disputed issues; Pre-trial deals with issues that are either unnecessary or which cannot be disputed. It is not Summary Judgment, for summary judgment deals only with cases in which there is no dispute of fact, i. e., cases which do not need trial at all. It is not Discovery, for Discovery is the procedure designed to obtain facts theretofore unknown.

Pre-trial is not a theory of law, a principle of justice, or a matter involving constitutional rights. It is a gadget; and like some gadgets it may be very useful, and like others

it may cause more trouble than it is worth. Perhaps it would be more dignified to refer to Pre-trial as a tool; and it is a tool used, as its name implies, before the trial of a case. In this respect it is in the same category as Discovery, and of course in a much wider sense, Pleading. In theory it contains nothing new. For centuries Common Law judges have had and exercised the right to call counsel into conference before a trial in order to discuss issues, settle pleadings, agree on order of proof, stipulate as to undisputed facts, and, in rare cases, to discuss settlement. However, the exercise of this power, cheerfully concurred in by the Bar, has been limited generally to the more complicated cases. The general run of cases has come up in the good old fashioned way, with the judge knowing nothing about them before they begin, and counsel playing their cards close to their vests. Uncounted hours of preparation by counsel and of the time of participating witnesses have been spent in getting ready to prove lots of things which did not have to be proved, and lots of things that could not be disputed. Judges seeing the files for the first time as the trials began, have racked their overworked and underpowered brains by glancing at a maze of pleading in an attempt to discover what the case was really about. I leave it to statisticians and sociologists to work out the number of millions of man days which could have been saved if, in every case, as a matter of routine, the judge had been able to sit down with counsel, a week or so before trial, and ask one or two simple questions, about the case.

If the judge and counsel on both sides are able to have a half hour's conversation, it would frequently appear that many facts are undisputed; that many documents are not questioned; that the widths of streets, cycles of traffic lights, ownership of motor vehicles, etc., are not questioned, and can be agreed upon. Thereafter the whole time of the attorneys in preparation and of the court at the trial can be concentrated on the true issue of the case rather than on useless preparation for unnecessary issues, and necessary preparation against surprise issues. What, then, is the difficulty? Obviously it is simply a mechanical or practical

difficulty, namely, the difficulty implied by the phrase "Trying the case twice," and inherent in any situation in which a great many people have to be gotten together without their wasting as much time in trying to prevent wasting time as they would have wasted originally. That the problem is not insoluble, is indicated by experience in other States.

Many lawyers in Baltimore are familiar with the embryonic efforts which I have made in jury trials after opening statements have been made by counsel. My practice, which has steadily increased, has been, after opening statements of counsel have been made to the jury, to dictate in open court a Stipulation embodying the facts which both counsel have already stated to the jury. This includes identity of parties, ownership of motor vehicles, agency, widths of streets, state of the weather, identity of books of account, accuracy of photographs, genuineness of record books, authenticity of documents, and many other matters which are essential elements of any case, but which in the case on trial are undisputed. It has saved a great amount of time, and it has concentrated the attention of the jury on the true issue. But it has never taken place until after the trial has actually started; and thus all of the preparation involved in proving essential but undisputed points has been wasted.

Pre-trial is merely an extension of this practice in the time dimension, whereby the agreement comes from a week to two months ahead of the final trial preparation, and makes a vast amount of that preparation unnecessary.

Pre-trial is a comparatively new device, but there has been a large amount of periodical legal literature devoted to it. It really did not start until 1929 when Judge Ira W. Jayne, of Detroit, originated the system as a system, rather than as an idiosyncrasy of an individual judge.

Since then the Law Reviews have had many articles on the subject, and two books stand out as valuable sources of information. The first is Chief Justice Arthur T. Vanderbilt's "Minimum Standards of Judicial Administration", published in 1949. Chapter 5 of that survey is devoted to

Pre-trial conferences, and gives the present status of this device in the United States. The only textbook devoted solely to this subject which has come to my attention is that of Mr. Harry D. Nims, of the New York Bar, entitled "Pre-trial", and published in 1950. Mr. Nims has evidently engaged in a vast correspondence with judges all over the country, and has embodied in his book many of the personal views, individual practices and local variations which have been experimented with from Maine to California.

Perhaps more important than textbooks and law review articles are the "live" demonstrations which have been put on before Bar Association meetings by advocates of Pre-trial procedure. Judge Bolitha J. Laws, of the United States District Court for the District of Columbia, and Judge Jayne, are among the most active of these proponents. A most interesting demonstration was given by Judge Laws at the Seattle meeting of the American Bar Association in 1948, and again at the Washington meeting in 1950. Anyone who has seen one of these demonstrations must, I think, be convinced that unless the machinery to prepare and operate Pre-trial procedure is too cumbersome, the Pre-trial conference has great value. A similar demonstration might well be considered for the future by the Maryland Committee on Continuing Legal Education.

The earliest reported case on the subject seems to have arisen in Massachusetts in 1937. It is *Fanciullo v. B. G. & S. Theatre Corporation*,¹ and it refers to an order of one of the judges in Boston (Suffolk County) dated June 20, 1935 as the origin of Pre-trial procedure in Massachusetts. Since then something like 200 reported cases have now appeared in the Reports. In them are found dicta indicating further the objects of Pre-trial. For example, in *Byers v. Clark & Wilson Lumber Co.*,² the "elimination of surprise". In *La Canin v. Automobile Insurance Company*,³ the court stated that its object was to "avoid elaborate preparation on non-existent issues".

¹ 297 Mass. 44, 8 N. E. 2d 174 (1937).

² 27 F. Supp. 302 (D. C., D. Ore. 1939).

³ 41 F. Supp. 102 (D. C., E. D. N. Y. 1941).

Judge Vanderbilt's statistics show that although Pre-trial is so recent as a system, it is now accepted officially in 26 States either as a matter of practice, or by rule, or by statute. In only 19 States is there no official recognition of Pre-trial. Maryland is of course among the 19, and we have some respectable company, including Virginia, New York and California. But the black, or non Pre-trial, areas on Judge Vanderbilt's map also coincide to a large extent with the less enlightened areas of the United States, and even in his shaded areas, large metropolitan communities such as Boston, Detroit and New York City have established Pre-trial in their courts. Surprisingly enough, California adopted Pre-trial, and abandoned it after two or three years. Perhaps this is one of the best arguments for our taking it up. As is well known, the Federal Rules (Rule 16) provide for Pre-trial throughout the Federal system, although it is optional with each judge as to whether or how he should use it.

In Maryland I know of no court rules requiring Pre-trial or even sanctioning it, but I know also that in Baltimore County, Judge Howard Murray and Judge John Gontrum have used it extensively, and they at least say, with good results. Whether other judges in Maryland have tried it, I do not know. Whatever may be the future of Pre-trial as practiced in Baltimore County, I have at least not heard of any impeachment proceedings brought against Judge Murray or Judge Gontrum as a result of their using it.

When the Federal Rules were adopted, a survey was made of the uses of and experience with Pre-trial, and the result was embodied in Rule 16 of the present Federal Rules. While the Federal Rules thus approve Pre-trial, the institution itself is essentially an outgrowth of State practice, and I think it should not be condemned for the sole reason that it is in the Federal Rules.

An examination of the various Rules covering Pre-trial will soon disclose that its essential nature is embodied in two basic elements, viz.: (1) The conference; (2) The Pre-trial order, indicating the nature of the case, the area of

agreement, and the area of disagreement. A necessary adjunct is the efficient operation of a Pre-trial Docket.

One thing should be made clear at the outset, namely, that Pre-trial procedure is as varied and as variable as judicial personality and geographical diversity. There is no uniformity whatever about it, and the way in which it is handled has varied from State to State, from city to city, and from judge to judge, to suit the exigencies of the legal, local and judicial temperament. The only criterion is to make it useful in the light of all the conditions surrounding it.

In order to forestall some fears, I call attention to the fact that most persons familiar with Pre-trial do not include as an essential of Pre-trial the desire to promote settlements, or to force settlements, or to bludgeon recalcitrant parties into settlements, which the judge believes, but the parties do not believe, ought to be made.

Since the matter is entirely informal, any modification can be made without formality. It might even be proper to say that the form of Pre-trial procedure can hardly be changed, because it has no form. Each Pre-trial act automatically takes a form appropriate to the case itself. But with this qualification, we can see that the specific functions of the Pre-trial conference deal with the following 6 specific matters: (1) Simplification of the issues; (2) Necessity or desirability of amending the Pleadings; (3) Obtaining agreements on facts common to both parties, undisputed, or indisputable; (4) Obtaining agreements as to exhibits, whether as to authenticity of originals, or accuracy of copies; (5) Limitation as to the number of expert witnesses; (6) Advisability of preliminary reference to a Master for findings. Of these the 3rd and 4th, namely, the undisputed facts and documents, seem to me to overshadow in importance all the others put together. In every case there are facts which can be agreed on; in many cases there are documents which cannot be disputed. Only in a minority of cases is there a real necessity for simplification of issues, amendments, provisions as to expert witnesses, and references to Masters.

As indicated by the demonstrations which I have seen, a Pre-trial conference requires from 10 to 30 minutes in the average case. Most cases, of course, are simple, and the Pre-trial conference is correspondingly simple. Like the Rules of Discovery, it cannot be operated by a judge imposing his will upon unwilling counsel. Counsel must co-operate; and again, like Discovery, counsel will probably find that this innovation is not for the benefit of plaintiffs or defendants, but for the benefit of both sides alike.

At the end of the Pre-trial conference, the judge prepares an Order embodying the results of the conference, and this order is the tangible product which comes out of the conference. There is no set form for it, and no universally accepted way of preparing it. But after it has been made and signed by counsel, it is the controlling document in the case. To a large extent it supersedes the Pleadings, for it says in simple and brief language what the Pleadings say in language which I regret to say is often as obscure, unintelligible and prolix as the lawyers can make it. When the formal trial begins, not only the lawyers but the trial judge can see at a glance exactly what the case is about, and exactly what is the question in dispute.

It may seem, so far, that the picture that I have drawn is so rosy that I cannot substantiate my claim to be an unprejudiced observer, and that I am really a convinced advocate of Pre-trial procedure. I will confess that I am an advocate of trying it out, but there are many problems connected with it on which I have not taken sides; and I outline them in order that the Bench and Bar may have an idea both of the wide variations in actual practice throughout the country, and of the difficulties which may be encountered.

The first basically unsettled question is whether the Pre-trial Judge should be the same judge as the trial judge. There are advocates of both systems. On the one hand, it is contended that the Pre-trial conference loses half its value if the Pre-trial judge merely makes up and hands on a short memorandum to another judge; it is the Pre-trial judge who has understood the atmosphere of the case and the conten-

tions of the parties, and it is he who ought to try the case. On the other hand, it is contended that if the Pre-trial judge is also the trial judge, and particularly if there has been any talk of settlement, he has already not only pre-tried, but has also pre-judged the case; and the party against whom he has conceived some prejudice will inevitably have thrown away his chances of winning. There is no agreement on this question, but there is great variety in practice. In 13 states the judge who will hear the case presides at Pre-trial. In 4 states a different judge presides. In 9 states both systems are used. In some states a single judge is specially assigned to hear all Pre-trials. As far as I can tell, neither side has proved its case, and all systems work with considerable satisfaction to those who use them.

Another question, though hardly of so great importance, is whether the Pre-trial conference should take place in the courtroom or in chambers. Some judges prefer one, and some the other. Neither side in this controversy seems to criticize the other severely, but each advocates its own system. Since a Pre-trial conference is held as a result of a formal and compulsory summons, and is based upon a regular calendar or docket, I should be inclined to favor a conference in open court. I think the controlling factor, however, would be the personalities of the judge and the counsel. One by-product of having the case in open court is, that the attorneys waiting for the next case would hear the proceedings; but I can understand that there may be a difference in opinion as to whether this is good or bad.

It is still unsettled as to whether parties should be expected to be present at a Pre-trial conference. In some jurisdictions the judges seem to welcome the presence of the parties, feeling that if the client is not present he may think that he has been double-crossed by more or less secret proceedings held in his absence. In one State, Wisconsin, the parties are required to be present in family cases. In other jurisdictions the judges take the position that a Pre-trial conference is of such an informal nature that it is better to have it purely between court and counsel. My own feeling would be that the normal Pre-trial conference

should be held between the judge and counsel only, but that if the clients want to attend they should be allowed to do so.

There is no uniformity in the practice with respect to the time at which the Pre-trial conference should be held. In some jurisdictions it is held on the first day of the term, i.e., immediately before trial. In some, e. g., Ohio, the reverse procedure is followed, and it is held as soon as issue has been joined. The vice of the first system is that since the lawyers must be ready for trial, they must have made all the preparation which the Pre-trial system is designed to avoid. The vice of the second alternative is that the lawyers are often not ready, have not worked up the case, and do not know sufficient facts to participate in an intelligent Pre-trial conference so early in the course of the action. The weight of opinion seems to be that the best time for the Pre-trial conference is two or three weeks before the anticipated date of trial. At this point counsel must be fairly well informed on the facts, must know approximately what they will be able to prove, and also presumably know enough to engage in intelligent negotiations for settlement. There is no uniformity, and only experience will tell what is the best time for the conference.

Should Pre-trial be used in jury cases only, in non-jury cases only, or in all kinds of cases? Again there is no uniformity. The history of the matter indicates that Pre-trial was started in connection with jury cases only, and has been extended gradually to other cases. In at least one State, Pre-trial is used only in connection with non-jury cases and jury cases are excluded. In many jurisdictions divorce and other domestic relations cases are excluded. There seems to be neither unanimity nor sufficient experience upon which to base a final opinion on the character of cases in which Pre-trial can be usefully employed. Nor is there uniformity on whether Pre-trial should apply to all cases or only to selected cases within a given category.

Another question on which agreement has not yet been reached is the extent to which Pre-trial should inquire into

the cases of the respective litigants. Is there any duty of disclosure by the attorney for the plaintiff of facts not known to the attorney for the defendant? Is either attorney entitled to inquire at the Pre-trial conference into matters which would be the proper subject of Discovery, or even into matters beyond the scope of the Discovery procedure? How far should Pre-trial take the place of Discovery, whether in its old form of requests for bills of particulars or in its modern form of depositions for Discovery? Should, for example, the defendant be entitled in a motor vehicle case to inquire as to exactly what specific acts of negligence the plaintiff intends to prove; or may he be allowed to fortify himself behind general allegations of negligence? There is little law covering these points, but the trend would seem to be in the same direction as that of Discovery itself, namely, to widen the field of inquiry for the purposes of eliminating surprise, and generally confining the formal trial to issues known in advance by both sides.⁴

Many practical problems have arisen with respect to conducting Pre-trial conferences in rural areas. In one district in Iowa, for example, the distance between county seats at the limits of a judicial district is 350 miles, and the time required to travel from one county seat to the other by railroad is two days. Obviously, we have no such problems of distance in Maryland, but we have similar problems in less acute form; and since convenience and efficiency is the very keynote of the Pre-trial procedure, some means must be devised to obviate the necessity of requiring lawyers to travel twice to the place at which the judge sits, instead of once.

After the Pre-trial order has been drawn up and signed by the judge and counsel for the parties, how far should amendment be allowed? The very object of the Pre-trial order is to obviate the necessity of unnecessary proof, and to provide a base upon which firm reliance can be placed by any lawyer in preparing the case. The order constitutes

⁴ Nims, *Pre-Trial* (1950), 115 and *Duffy v. Gross*, 214 P. 2d 498 (Colo. 1950).

not only an agreement, but an agreement of some dignity, which should not be disregarded except for weighty reasons. Clearly, cases may arise in which it would be unjust to insist upon the letter of the agreement where a mistake has been made. My own practice with the embryonic stipulation which I mentioned above,⁵ has been always to insert a clause allowing any party to call attention to any error in the stipulation, and to introduce evidence to correct such error. This clause has allayed the fears of many lawyers who would otherwise be unwilling to stipulate; but my actual experience has been that although I have dictated hundreds of such stipulations I remember no instance in which one had to be modified. Perhaps the answer to the question as to how far amendments should be allowed is contained in the simple sense of justice which inspires a provision in force in many states, namely, that when once made, the Pre-trial order shall not be amended except "to prevent manifest injustice".

Should the Pre-trial order be signed by the judge alone or by the judge and counsel, and when and where should it be prepared? Some judges prepare a Pre-trial order after the conference, sign it and mail it to counsel. Some judges prepare the Pre-trial order in the presence of counsel, but do not require counsel to sign it. Other judges dictate the Pre-trial order in the presence of counsel, sign it and then require counsel to sign it. It seems to me that the procedure of Judge Laws⁶ is the best, namely, as a part of the conference itself, to dictate the Pre-trial order to a stenographer who does not take it down in shorthand, but types it directly from dictation. When this is done, counsel examine it, and it is signed by both counsel and judge, before counsel leave the conference room. This method seems to me to offer the greatest chance of expedition, accuracy, and mutual understanding.

How far should Pre-trial be compulsory? To those of us who are used to the crowded dockets in Baltimore City, and who know how high is the proportion of cases which

⁵ *Supra*, p. 305.

⁶ *Supra*, p. 306.

never come to trial, it may seem that the institution of compulsory Pre-trial in every case would entail a tremendous waste of energy on the part of both the Bar and the Bench. Is it possible to pre-try every case without twice trying every case, and is it sensible, when everyone knows that at least half the cases will not be tried anyway? The Federal rules leave the matter of Pre-trial in every aspect optional with the District judges. Again, the only answer to this question must be furnished by experience.

I have saved the hottest controversy until the end. It is the question of Settlements. On the one hand, certain proponents of Pre-trial state that one of the major benefits to be obtained from it is the fact that the judge who hears the case at Pre-trial gets a fair idea of the merits and can intervene effectively to promote and urge a just settlement. Some Rules specifically state that one of the objects of Pre-trial is to promote Settlements. On the other hand, the exact opposite is contended for, namely, that Settlement is the lawyers' business, and not the judges' business; that some judges are more interested in settling cases than in doing justice; and that in any event, if the judge takes a hand in urging or even suggesting a settlement, he is stepping out of his proper function, and to a certain extent disqualifying himself for trying the case if it is not settled.

There seems to be no doubt that Pre-trial does in fact result in increasing the number of Settlements, but there is great doubt in my mind as to whether more cases are settled because the judge tries to get them settled, than because the simple elements and value of the case emerge from the Pre-trial conference proceedings. The lawyers are not fooled, and each side is probably experienced in evaluating its case, and in knowing what it is worth for purposes of settlement.

Logically, a judge is stultifying himself in urging the settlement of cases, for the judge's business is primarily the trying of cases. Practically, of course, this is not true, and the judge may be very helpful in promoting a settlement where there are disputed facts, and where the out-

come of the trial is subject to the uncertainties of the reactions of the jury.

Every shade of opinion seems to be represented in this controversy about how large a part the judge should take in promoting settlements. Judge Jayne,⁷ a very experienced and careful judge, includes the promotion of Settlements as one of the functions of the Pre-trial judge, but, he emphasizes, only after everything else has been done.

Some judges take the position that although they should not initiate negotiations for Settlement, neither should they discourage such negotiations. These judges wait until one of the parties suggests that he explore the possibilities of settlement. I incline to the view that this is the proper course for the judge to aim to follow, but even in such a course there are pitfalls, for the lawyer with a weak case might easily try to hide behind the judge's authority, and perhaps use it to bolster up a flimsy contention which the other side might otherwise easily be able to disprove at the trial itself. Again we are in the field of personalities and variations due to the circumstances of individual cases.

One fact does emerge, however, from the utterances of all the contestants in this dispute, namely, that Pre-trial does result in many settlements, and there seems to be far more satisfaction than dissatisfaction with the way in which this result takes place.

I can sum up what I have tried to say very simply. As Mr. Nims points out, after his survey of the Pre-trial field, lawyers have for years been free to confer with each other on Settlements, but they have been chary of initiating negotiations for fear that such action would be taken as a sign of weakness. For years judges have had the power to call conferences, but they have been too busy, particularly in the larger cities, to do much more than try cases, and they have also been prevented from doing so by the habit and tradition of the profession, which confines the judges' function to formal hearings, and shows considerable hostility to their initiating, or even taking part in, any activity looking towards compromise. We have also been bound by

⁷ *Supra*, p. 305.

the old-fashioned theory of the trial with no holds barred, the trial of wits, the trial as a public entertainment at the county seat, and the pleasure of watching a good fight.

In the comparatively short time which has elapsed since wide use of Pre-trial has been in existence, Pre-trial has been found to be beneficial to the courts; it has reduced the time and effort necessary to try cases. It has been beneficial to litigants whose costs have been lessened, and whose time has been saved in presenting their cases. It has been beneficial to witnesses, from whom the court often gets the benefit of testimony without actually wasting time in court. It has been beneficial to the Bar through increasing its own efficiency by increasing the volume of business transacted. It has also increased the confidence of the public in the profession generally. There are many problems to be solved, but they are problems of detail rather than problems of principle.

For my own part, it seems to me that in Maryland two things are needed: (1) Professional blessing by rule or otherwise for an optional Pre-trial procedure; and (2) a Pre-trial experiment on a substantial scale. Pre-trial is simply the use of common sense in preparation for trial. It does not take the place of the formal trial dealing with disputed issues. It does not take the place of Discovery to obtain new information. It does not take the place of Summary Judgment, in disposing of cases where there are no disputed issues. What it does do is to eliminate from the trial itself the irrelevant, unnecessary, fictitious and obstructive matter which now makes our formal trials something far less than models of efficiency. The testimony of those whose views I have read indicates that Pre-trial procedure is not only common sense, but that it will be good for the pocketbooks as well as for the consciences of both the Bar and the public. I hope that before the next mid-winter meeting, someone will have gotten started on a substantial experiment in Maryland from which the Bench and Bar can draw their own conclusions.

And now back to Little Willie. Willie Maryland is not the worst of the 48 boys in the class, but neither is he the

best. Willie Maryland is not an angel; he has many good qualities, but he also has some bad ones. In some respects his manners and his actions could be improved by sympathetic counsel and labor on the part of us, the members of his family, including his sisters and his cousins and his aunts.